

MISC APP 42/12

IN THE HIGH COURT OF SIERRA LEONE

JUDICIAL REVIEW OF THE ORDER OF HIS WORSHIP MR SHYLLON,  
PRINCIPAL MAGISTRATE MADE ON 24 FEBRUARY, 2012.

BETWEEN:

DESMOND DUMBUYA - DEFENDANT/ APPLICANT

AND

PHILIP BRIMA KAMARA - COMPLAINANT/RESPONDENT  
(SUING AS ATTORNEY FOR EDWARD ANSUMANA KAMARA)

COUNSEL:

M P FOFANAH ESQ for the Applicant

E A HALLOWAY ESQ for the Respondent

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE  
JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 27 DAY OF JULY, 2012.

1. The Applicant has applied to this Court for Judicial Review of the Decision made on 24 February, 2012 of His Worship, Mr Shyllon, Principal Magistrate, Presiding in Court No.3, Freetown. In that decision, Mr Shyllon overruled a No-Case submission made by Counsel for the Applicant in the Court below. The grounds for that submission were that the Information filed by the Respondent in the Court below, was defective, in that it was brought by *"Philip Kamara suing as Attorney for Edward Ansumana Kamara"*. Further, that the Information filed, was also defective in another respect, in that it charged an offence contrary to Section 20(iv)(b) of the Larceny Act, 1916, an obvious error. The correct reference should be, of course, to Section 20(1)(iv)(b). As I pointed out to Mr Fofanah, during the course of argument, this was hardly a fatal error: it was one which could have been cured by amendment, even after the Learned Magistrate's Ruling on the No-Case Submission. The more fundamental point, was that neither the Complaint nor Information was laid by the victim, but by someone else suing as his Attorney. Attorneys

do bring civil proceedings on behalf of their principals, but I am not aware of the same procedure being adopted in criminal proceedings. I did ask Mr Halloway for a precedent in this respect, but he was unable to provide me with one. I do not think there is any such authority. Instead, Mr Halloway embarked on an unconvincing attempt to extrapolate the definition of "prosecutor" in Section 2 of the Criminal Procedure Act, 1965 (CPA, 1965), to include an agent suing on behalf of his principal. That definition is an inclusive one: it states: *"Prosecutor" includes complainant and means a person who gives information or causes information to be given on his behalf against the accused or the defendant and who intentionally associates himself with the prosecution, so however that the mere signing of an indictment or charge sheet by a law officer or other person authorised in that behalf by the Attorney-General and Minister of Justice shall not make such person a prosecutor.*" What this means is that a prosecutor could be (i) the complainant; and if he is, then he is also either (ii) a person who gives information against the accused or defendant; (iii) a person who causes information to be given on his behalf against the accused or defendant; and (iv) in all three cases, a person who intentionally associates himself with the prosecution. It should be noted that the conjunctive, 'and' not the disjunctive 'or' is used in this definition. This means that to become a complainant in a criminal case, a person should fall within the description of persons set out in (i) - (iii), and also be someone *"....who intentionally associates with the prosecution."* Nothing in this section permits the laying of the information on behalf of someone else, as an agent as Mr Philip Brima Kamara has purported to do.

2. In this respect, Edward Ansumana Kamara fits the description in (i) because he is the complainant; he is the victim of the offence charged in the Information; he also fits the description in (ii) because he is the person who *"gave the information"* laid on his behalf by Mr Alhaji Kamara; he also fits the description in (iii) because *"he caused information to be given on his behalf"* by Mr Alhaji Kamara, his Solicitor, as is evidenced in the Information dated 25 February, 2011. Note the words used by Mr Kamara at the bottom of the Information: *"This Information was taken out and filed by Alhaji M Kamara of No. 23 Soldier Street, Freetown, for and on behalf of the Complainant herein."* A small



point of correction here: The Information in a criminal matter is not "taken out". It is "given" or "laid". And as Mr Alhaji Kamara is not a Law Officer, nor a person authorised in that behalf by the Attorney-General and Minister of Justice", he is not excluded from the description of "prosecutor" in Section 2.

3. Section 16 of the CPA, 1965 provides the procedure for bringing criminal proceedings. It provides that "*in every case, the Court may proceed either by way of summons to the accused or defendant, or by way of warrant for the arrest of the accused in the first instance....*" And Section 17 provides that: "For the issuing of a summons the information need not be put in writing or be sworn to unless the Court so directs." Notwithstanding, the provisions of Section 17, an Information is usually laid in writing, as evidenced by the Information laid by Mr Alhaji Kamara.
4. The issue of who a prosecutor is, is also dealt with in the provisions dealing with the procedure in Court. If the proceeding is a summary trial, Sections 94 and 95 require the presence of the "prosecutor". It is otherwise in the case of preliminary investigations governed by Part III of the CPA, 1965 - see Sections 108-111 of the CPA, 1965.
5. The issue at stake in these proceedings before me, is not whether there was a doubt about who the prosecutor is or was, but whether it was proper to bring the proceedings by way of an agent. It therefore matters not whether the complainant, Philip Brima Kamara gave evidence. If the Information was incurably bad, then it should fail and should be struck down by this Court. I hold the view, that this objection having been taken by the defence to the Information as laid, all Prosecuting Counsel had to do, was to apply to the Court to amend the Information by deleting the surplusage "*suing as Attorney for Edward Ansumana Kamara*". And had the Presiding Magistrate acceded to his Application, he would not have been faulted. As it is, he ignored Counsel's submission in this respect altogether in his Ruling of 24 February, 2012. This is perhaps because, objection had been taken at the start of the trial on 4 March, 2011, to the title of the proceedings. Complainant's Counsel, Mr R A Nyoander applied for the Information to read "*Edward Ansumana Kamara suing by his Lawful Attorney Philip Brima Kamara*". The Application was granted by the Learned Magistrate as appears in his minutes for 4 March, 2011. Having

perhaps started off on the right footing, prosecuting counsel ended up on the wrong footing.

6. This earlier Ruling of the Learned Magistrate, reminds me of the fate which befell the Indictment in the case of LANSANA v R [19170-71] ALR SL 189 CA. There, Counsel for the accused had applied to the High Court that the charges as laid in the Indictment, i.e. preparing to overthrow the Government in one count, and endeavouring to overthrow the same Government in the next count, when the facts alleged were the same, created, and were bad for uncertainty. They prevailed upon the trial Judge, COLE, Ag.C.J to join acts of preparing and of endeavouring in one Count, and the Learned Ag C.J. regrettably, acceded to their Application. On appeal, Counsel argued to the contrary. They contended that charging preparing and endeavouring in the same count, made that count bad for duplicity. The Court of Appeal, TAMBIAH,JA presiding, agreed with them, and discharged all the accused persons.
7. The irregularity in the instant case, appears on the face of the record, and it is not one which this Court can overlook, as excusing it will result in great confusion in the criminal Courts. It was in fact created by prosecuting counsel.
8. This was already the position of the Court, when another issue drew my attention. The charge is Fraudulent Conversion contrary to Section 20(1)(iv)(b) of the Larceny Act,1916. The penalty is a maximum sentence of 7 years imprisonment. The jurisdiction of a Magistrate's Court is circumscribed by the provisions of Section 6(1)(a)&(b) of the Courts' Act,1965 as amended. It provides: "*6.1. In addition to any criminal jurisdiction which may be conferred upon Magistrates' Courts by any other enactment, every such Court shall, notwithstanding any enactment to the contrary, have jurisdiction to try summarily - (a)(i) any offence committed within the territorial waters of Sierra Leone.....(ii) any offence punishable by a sentence of imprisonment for a term not exceeding 5 years or a fine not exceeding (Le1million, as a result of the NPRC Penalties and Fines Decree,1993) or both such imprisonment and fine; (b) with the consent of the accused but not otherwise any offence, if during the course of a preliminary investigation, the Court shall conclude that, having regard to the circumstances of the case, the offence is one which, if proved, can suitably be punished by a sentence of imprisonment not*



- exceeding 7 years or a fine not exceeding (Le2million as a result of the 1993 Decree): provided that the Court shall not summarily under this Section any of the offences specified in the second schedule.*" Clearly, the Magistrate has jurisdiction in the first instance, to impose a maximum sentence of 5 years imprisonment; and, if the accused so consents to the P.I. being converted to a summary trial, to impose a sentence not exceeding 7 years. What a Magistrate clearly does not have, is to begin to try summarily, an offence for which the maximum punishment is 7 years. Many Magistrates have, in my experience, not quite clearly understood the provisions in the second schedule to the Courts' Act. The offences listed in that schedule cannot be tried summarily, whether the accused person consents to them being so tried or not. Magistrates have wrongly concluded that if a particular offence is not listed in that schedule, this means that the offence could be tried summarily by them without going through the motions of a Preliminary Investigation. That is not so. The proceedings in respect of any offence for which the sentence exceeds 5 years, has to be commenced as a P.I.
9. The minutes of the Presiding Magistrate, and the proceedings in the Court below have been filed in the proceedings in this Court. The pages are not numbered, but the Learned Magistrate's minutes for 4 March, 2011 read as follows: "#charge read # plea taken # Not Guilty # Bail refused - flight risk - claimed by solicitor for compl. adj 7/4/2011." Clearly, the Magistrate had begun to try an Indictable offence, summarily. This was wrong, and could not be remedied without the prosecution offering no evidence on the Information before the Court; or, by requesting the Acting Director of Public Prosecutions to enter a Nolle Prosequi, in which case, the Defendant could be discharged, and the proceedings could be started afresh. The whole trial was therefore a nullity.
  10. In the premises, I am satisfied that there are grounds for quashing the decision of the Learned Magistrate made on 24 February, 2012, and the whole proceedings before him, for irregularity on the face of the record. Order 52 Rule 8(2) of the High Court Rules, 2007 empowers this Court, where it quashes a decision, to, ".....in addition.....remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and proceed in accordance with the findings of the Court." I have given

due consideration to this Rule, but I find it difficult to apply it in the circumstances of this case, as I have also found that the Information ought not to have been laid in the format in which it was laid.

11. I THEREFORE ORDER that the Decision of the Learned Magistrate, His Worship Mr Shyllon made the 24 day of February, 2012 and all proceedings taken before that date before the learned Magistrate are QUASHED for irregularity. The Applicant herein DESMOND DUMBUYA is therefore discharged (NOT ACQUITTED) in respect of the Information dated 25 February, 2011. No Order as to Costs.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL.